Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

JACQUELINE PADDIO,
PETITIONER

v.

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RONALD L. WILSON
FNBC Building, 18th Floor
210 Baronne Street
New Orleans, Louisiana 70112
(504) 525-4361

COUNSEL FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the presence of two blacks on a jury panel precludes the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether counsel's statement that he did not "think that it is appropriate for us to discluse to the court why we chose a juror" requires a finding that it was in fact based on race, pursuant to this Court's decision in *Hernandez v. New York,* 111 S.Ct. 1859 (1991)?

3. Whether the striking a black venire persons for reasons and under conditions that similarly situated white venire persons are not struck violates the Equal Protection Clause of the 14th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the courts below: Board of Trustees for State Colleges and Universities; Dr. G. Warren Smith, individually and in his capacity as President, Southeastern Louisiana University; Dr. Robert Butler, individually and in his capacity as Vice-President, Southeastern Louisiana University; and Thomas Douple, individually and in his capacity as Director of Athletics, Southeastern Louisiana University.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO.

JACQUELINE PADDIO,

PETITIONER

v.

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL,

RESPONDENTS

PETITION

Jacqueline Paddio petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on December 1, 1993.

OPINIONS BELOW

The opinion of the court of appeals (93-3093 Pet. App. 1a) is not reported. The opinion of the district court (91-42277-"N"(MAG 3) Pet. App. 2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the United States Constitution privides as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner, Jacqueline Paddio, commenced an action in the United States District Court for the Eastern District of Louisiana on the 20th day of November, 1991, pursuant to 20 U.S. §§ 1681, *et seq.*, 42 U.S.C. §1983, and the First and Fourteenth Amendment to the United States Constitution. Petitioner charged defendants, Board of Trustees for State Colleges and Universities, Dr. G. Warren Smith, Dr. Robert Butler and Thomas Douple with: (1) relieving her of her duties and responsibilities as head coach of the volleyball and softball teams, because of her race and/or sex and/or in retaliation for having spoken out against and filing a lawsuit complaining about defendants' unlawful employment practices, and (2) denying her the same employment opportunities, benefits, compensation, terms and privileges of employment as the other head coaches, because of her race and/or sex and/or in retaliation

for having spoken out against and filing a lawsuit complaining about defendants' unlawful employment practices.

2. The trial of the matter was tried before a jury of seven (7) persons, commencing on February 1, 1993, and continuing through February 4, 1993.

3. At the trial of this matter, each side was permitted three (3) peremptory challenges. Defendants exercised their peremptory challenges to exclude Lorraine Beaulieu, black female, Joe Dugas and Horace Golden, black males. Petitioner interposed a timely objection to the striking of these jurors, alleging that they were exercised solely on racial grounds.

4. The Honorable Lance Africk, Magistrate Judge, asked counsel for defendant to articulate the reasons for his rejection of the three (3) black venire persons. (Pet. App. 3a) Counsel responded by stating:

> Judge, in all due respect, I don't think it is appropriate for us to disclose to the court why we chose to excuse a juror. I would like to point out in response to counsel's motion that we accepted two black jurors before we exercised any challenge for black jurors. (Pet. App. 3a)

5. Upon being advised by the court that he was in fact required to state the reasons therefor, counsel articulated the following reasons for striking Ms. Lorraine Beaulieu:

> We thought Ms. Beaulieu's background and education and apparent level of sophistication was below what was needed to understand the issues in this particular case. She's a housewife. She is not involved in the workforce. She doesn't understand employment. She does not have any reason to understand the goal of higher education. And we felt that's not the kind of juror that we need in this case. (Pet. App. 4a)

6. The characteristics deemed by counsel to be objectionable in Ms. Beaulieu were not possessed by her but instead by two (2) Caucasian females, whom he found acceptable. Ms. Beaulieu was not a housewife, and she was employed. (Pet. App. 5a) The two (2) Caucasian females, Mrs. Gail Couvillion (Pet. App. 5a), and Mrs. Diane Baldock (Pet. App. 6a), were unemployed housewives.

7. The Court, over petitioner's objections, concluded that petitioner "failed to establish a prima facie showing that the peremptory challenges were based on race [because] there are two blacks on the jury panel." (Pet. App. 7a) The court further stated that "based on the explanations given I don't find the challenges made were pretextural." (Pet. App. 7a)

8. The case proceeded to trial on February 1, 1993, with a jury panel consisting of five (5) Caucasians and two (2) black jurors. A verdict was returned on February 4, 1993, in favor defendants, and against petitioner. Judgment was rendered on February 5, 1993, dismissing petitioner's complaint. (Pet. App. 2a)

9. Petitioner filed a timely appeal of the verdict to the United States Court of Appeals for the Fifth Circuit. On appeal, petitioner raised and briefed the following issues:

> a. Whether defendants exercised their peremptory challenges in a way such as to exclude blacks, in violation of the Equal Protection Clause of the Fourteenth Amendment?
>
> b. Whether defendants' reasons for the employment actions taken against plaintiff were pretextual and whether the motivating reasons were race and/or sex?
>
> c. Whether defendants refused to renew plaintiff's contract to coach softball as a result of the lawsuit filed by her contesting her removal as coach of the volleyball team.

10. In a decision dated December 1, 1993, the Fifth Circuit, in a per curiam opinion, concluded:

> "... there is no error in the district court's determination that the defendants presented adequate reasons for their exercise of peremtory challenges and that those reasons were not pretextural. We also conclude that the district court did not err in entering judgment on the jury verdict." (Pet. App. 1a)

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided ques-

tions of considerable public importance in a manner that expressly conflicts with decisions of this court and other courts of appeal. By affirming the district court's determination that the presence of two (2) black jurors precluded the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges, the appeals court disregarded the command of this court to eradicate, not merely minimize, racial discrimination in jury selection. Further, in affirming the district court's finding that defendants' reasons for the use of their peremptory challenges was not pretextural, the appeals court disregarded this Court's instruction regarding the best method of determining pretext, to wit: demeanor of counsel. Finally, the Third and Eighth Circuits adopt the position that a race neutral explanation is incompatible with the rejection of black venire persons for traits which, if possessed by white venire persons, would not serve as grounds for rejection. The position of the Fifth Circuit, as evidence by this case, appears to be in conflict with those two circuits.

The questions presented herein will recur with regularity since most federal trials, particularly in urban settings, have black venire persons. Accordingly, review by this Court is clearly warranted.

I. THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE EVEN ONE JUROR, IF DONE FOR RACIAL REASONS, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. The Fifth Circuit decision affirming the district court's conclusion that the presence of two (2) blacks on a jury precluded petitioner from extablishing a prima facie case of racially discriminatory exercise of peremptory challenges directly conflicts with this Court's decisions in *Batson v. Kentucky,* 106 S.Ct. (1986) and *Edmondson v. Leesville Concrete Co.,* 111 S. Ct. 2077 (1991). It also conflicts with following circuit court positions: *Jones v. Ryan,* 987 F.2d 960 (3d Cir. 1993); *U.S. v. Joe,* 928 F.2d 99 (4th Cir. 1991), *cert. denied Baylor v. U.S. 112,* 112 S.Ct. 71, 116 L.Ed.2d 45, on remand 787 F.Supp. 548, *aff'd U.S. v. Skeeter,* 989 F.2d 496; *Splung v. Clark,* 960 F.2d 705 (7th Cir. 1992); *U.S. v. Bishop,* 959 F.2d 820 (9th Cir. 1992); and *U.S. v. Jiminez,* 983 F.2d 1020 (11th Cir. 1993). This square conflict warrants review by this Court.

2. In *Edmondson,* as in the present action, defendant used 2 of its peremptory challenges to remove black venire persons; the jury included 11 white persons and 1 black person. Plaintiff sought to have the defendant articulate a race neutral explanation for the exercise of its peremptory challenges, but the request was denied by the trial court. The jury returned a verdict on behalf of Edmondson, but it also determined that he was 80% at fault for the accident. Plaintiff appealed, and the Fifth Circuit held that this Court's holding in *Batson v. Kentucky,* 106 S.Ct. 1712, 1719 (1986), precluding the exercise of peremptory challenges to strike prospective jurors solely on the basis of race, applied with equal force to civil proceedings. In affirming the Fifth Circuit's decision in *Edmondson,* 107 S.Ct. at 2008, this Court stated:

Racial discrimination has no place in the court-

> room, whether the proceeding is civil or criminal. See *Thiel v. Southern Pacific Co.*, 328 U.S., at 220 66 S.Ct., at 985-86. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U.S.C. § 243; 28 U.S.C. §§ 1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially racially discriminatory challenges in a civil trial.

The case was remanded for further proceedings. If the presence of a black person on the jury precluded the establishment of a prima case of discriminatory use of peremptory challenges, there would have been no need for this Court to remand the case; there was one black person on the *Edmondson jury.*

3. In Jones v. Ryan, four black venire persons were called for voir dire. The prosecution exercised peremptory challenges to exclude 3 blacks, leaving one to serve on the jury. Speaking directly to the issue at hand, the court stated that "the mere presence of a single black on the jury would not prevent a finding of a prima facie case. 987 F.2d at 960. [citations omitted.]

4. The government in *U.S. v. Joe* used its peremptory challenges to exclude six blacks jurors, 5 from the panel and 1 alternate. Five blacks were seated on the jury. The de-
fendant moved to dismiss the juror, contending that the government used its strikes in a racially discriminatory manner. The district court denied defendant's motion, apparently on the basis that the presence of blacks on the

juror precluded a *Batson* violation. In rejecting the district court's conclusion, the Fourth Circuit stated that "a defendant is not automatically foreclosed from establishing a prima facie case of discrimination under *Batson* even when members of the defendant's racial group were seated." 928 F.2d at 102.

5. The Seventh Circuit's position is much more straightforward, finding a Fourteenth Amendment violation when the prosecutor exercises "even a single challenge if through that challenge he intentionally discriminates on the basis of race." *Splunge v. Clark*, 920 F.2d at 709. The fact that the percentage of blacks on the jury panel is equal to or greater than the percentage of blacks on the general venire does not, according to the position adopted by the Ninth Circuit, "offset a constitutional violation, thereby rendering the violation somehow harmless." *U.S v. Bishop*, 959 F.2d at 820. The Eleventh Circuit's position was clearly set forth in *U.S. v. Jiminez*, where the prosecutory employed 5 of his 7 challenges to exclude black males; 7 of the 12 jurors empaneled were black. This statistic, acccording to the court, "does not negate the possibility of race discrimination [.]" 953 F.2d at 1024.

6. Clearly, the position taken by the Fifth Circuit to the effect that the presence of blacks on a jury panel precludes the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges conflicts with that of the Third, Fourth, Seventh, Ninth and Eleventh Circuits.

II. COUNSEL FOR DEFENDANTS' DEMEANOR IN RESPONDING TO THE DISTRICT COURT'S INQUIRY MANDATED A FINDING, PURSUANT TO *HERNANDEZ V. NEW YORK*, THAT THE PEREMPTORY CHALLENGE WAS EXERCISED IN A RACIALLY DISCRIMINATORY MANNER.

7. In *Hernandez v. New York*, 111 S.Ct. 1859, 1869 (1991), this Court stated that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race neutral explanation for a peremptory challenge should be believed. There will seldom be evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."

8. When asked to articulate the reasons for the exercise of his challenges, counsel for defendant responded in a manner clearly bespeaking of a racially discriminatory use of peremptory challenges: (a) he stated that he was not required to divulge such information to the court, and (b) he attributed objectionable traits and characteristics to a black juror when they were in fact possessed by two white jurors, who were allowed to serve on the jury.

9. The trial court's decision that counsel for defendant articulated nondiscriminatory reasons for the exercise of his peremptory challenges, and the Fifth Circuit's affirmance of that decision, conflict which this Court's decision in *Hernandez*, for "a discriminatory intent is inherent in [counsel's] explanation." 111 S.Ct. at 1866.

III. THE EXERCISE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK BUT NOT WHITE VENIRE PERSONS FOR TRAITS SHARED BY BOTH NEGATIVES A RACE NEUTRAL EXPLANATION.

10. It is significant for the court to consider the issue of "comparability," eg., whether the rejection of a black venire person for possessing qualities and traits similar to those possessed by a white venire person, but which do not result in the rejection of the white venire person, negatives a neutral explanaton. The Third and Eighth Circuits have concluded that it does: *Jones v. Ryan*, 967 F.2d 960 (3rd Cir. 1993); *U.S. v. Wilson*, 853 F.2d 606 (8th Cir. 1988). The Fifth Circuit's position is at odds with that of the third and Eighth Circuits for, in the instant case, it affirmed the trial court's finding that defendant's counsel gave race neutral reasons for his exclusion of black venire persons notwithstanding the fact that the traits ostensibly found objectional by counsel were in fact possessed by the white venire persons, who were not rejected.

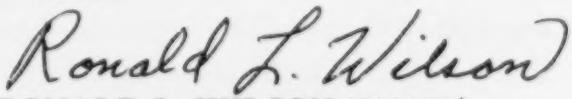
CONCLUSION

The position of the Fifth Circuit that the presence of blacks on the jury panel precludes the establishment of a prima facie case of racially discriminatory jury selection conflicts with that of this Court, the Third, Fourth, Seventh, Ninth and Eleventh Circuits. further, in affirming the trial court's determination that defendants' counsel gave a race neutral explanation for his peremptory challenges, the Fifth Circuit disregarded this Court's

unambiguous instruction in *Hernandez* that the best gauge of a "race neutral" explanation is the demeanor of counsel for defendant in exercising the challenges. Finally, the Fifth Circuit's failure two apply the test of "comparability" in determining whether counsel's articulation was pretextural conflicts with the position taken by several circuits, notably the Third and Eighth.

These are issues of national significance and, unless addressed by the United States Supreme Court, will recur with alarming frequency.

Respectfully submitted.



RONALD L. WILSON (#13575)
FNBC Bldg., 18th Floor
210 Baronne Street
New Orleans, Louisiana 70112
PH: (504) 525-4361
FAX: (504) 525-4380
ATTORNEY FOR PETITIONER

February 28, 1994

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3093

JACQUELINE PADDIO,
Plaintiff-Appellant,

VERSUS.

BOARD OF TRUSTEES FOR STATE COLLEGES
AND UNIVERSITIES, et al,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(91-CV-4277-"N"(MAG 3))

Before VAN GRAAFEILAND,* SMITH, and WIENER, Circuit Judges. PER CURIAM:**

Having reviewed the briefs, record, and argument of

* Circuit Judge of the Second Circuit, sitting by designation.

** Local Rule 47.5.1 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that his opinion should not be published.

Counsel, we conclude that there is no error in the district court's determination that the defendants presented adequate reasons for their exercise of peremptory challenges and that those reasons were not pretextual. We also conclude that the district court did not err in entering judgment on the jury verdict. Accordingly, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JACQUELINE PADDIO, — CIVIL ACTION NO. 91-4277

v.

SECTION: "N" (3)

THE BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL,

JUDGMENT

This cause came on for trial before a jury on February 1, 1993. After hearing plaintiff's evidence, the Court granted the motion of defendant, Board of Trustees for State Colleges and Universities, for a judgment as a matter of law.

Considering the answers of the jury to the interrogatories propounded by the Court at the trial of this matter; and, further considering the direction of the Court as to entry of judgment; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants, Dr. G. Warren Smith, President, Southeastern University of Louisiana, Dr. Robert Butler, Vice-President for Institutional Development, Thomas Douple, Director of Athletics, and against plaintiff, Jacqueline Paddio, DISMISSING said plaintiff's complaint.

New Orleans, Louisiana, this 5th day of February, 1993.

/s/ LANCE M. APRICK

LANCE M. AFRICK
UNITED STATES
MAGISTRATE JUDGE

DATE OF ENTRY FEB. 8, 1993

white? I can't remember.

MR. WILSON: Yes, sir.

THE COURT: Okay. So your basis for saying that is notwithstanding the fact they left two blacks on the jury, is the fact that they cut three blacks during their peremptory - -

MT. WILSON: Right. The fact - -

THE COURT: - - challenge, is that correct?

MR. WILSON: They only had three peremptories.

THE COURT: Okay. Can y'all tell me the reasons why you - - Let's start with Ms. Beaulieu. Can y'all tell me the reasons why you struck Ms. Beaulieu?

MR. SEALE: Judge, in all due respect, I don't think it's appropriate for us to disclose to the court or to counsel why we chose to excuse to excuse a juror. I would like to point out in response to counsel's motion that we accepted two black jurors before we exercised any challenge for black jurors.

THE COURT: Well, I'm not saying at this point that he made a prima facie case but in the alternative under the *Baton* case the burden then shifts to you to articulate a race neutral explanation for striking the juror. So it is appropriate when I, ask, Do you want to go ahead and let me

know what the reason is for the challenges. So why don't you tell me why y'all struck Ms. Beaulieu. That was Juror number 6. You want me to raise her hand so you can see her again?

MR. SEALE: No; sir, I remember. We thought that Ms. Beaulieu's background and education and apparent level of sophistication was below what was needed to understand the issues in this particular case. She's a housewife. She's not been involved in the work force. She doesn't understand employment. She does not have any reason to understand the goal of higher education. And we felt like that that's not the kind of juror that we need in this case.

THE COURT: Okay. How about Juror number 7, Mr. Dugas?

MR. SEALE: We just didn't think that -- We thought the Mr. Dugas may very well turn out to be as plaintiff-oriented juror. He's an engineer. He's employed at Dixie Brewery. We felt like he may have a union affiliation or a pro employee orientation and affiliation.

THE COURT: Is he the one that filed the slip-and-fall civil case?

MR. WILSON: Right.

THE COURT: Huh? Is that correct?

MR. WILSON: No, he didn't file a case, he was a juror.

THE COURT: He was a juror.

MR. SEALE: He was a juror in a slip-and-fall

MRS. AUGUST: I'm Theresa August. I live in New Orleans. I'm married. I have five children.

THE COURT: Okay, And do you work

MRS. AUGUST: Sometimes, August Building Maintenance.

THE COURT: Okay. And what does your husband do, ma'am?

MRS. AUGUST: He's retired.

THE COURT: What did he do when he was working?

MRS. AUGUST: Janitoral supervisor.

THE COURT: Thank you.

MS. WEYSHAM: I'm Gale Weysham. I live in Slidell, Louisiana.

I work for Cablevision and I'm widowed. I do have three children.

THE COURT:Okay, When your husband was alive, what did he do, ma'am?

MS. WEYSHAM: New Orleans Police Department.

THE COURT: Okay. And let me mention one other thing to y'all. When you're addressing the court, please make sure - - and I should have told you this - - you tell us your number. Because otherwise talking. Okay?

Okay. Juror number 6.

MS. BEAULIEU: My jury number is 191. My name is Lorraine Beaulieu. I live in New Orleans, Louisiana. I'm semiretired. I work four hours a day for A.M.E. Janitorial Service.

THE COURT: Okay. Are you married, ma'am?

MS. BEAULIEU: No, I'm not.

THE COURT: Okay. Thank you.

Okay, Juror number 7, Mr. Dugas.

MR. DUGAS: Yeah. I'm Joe Dugas. I live at 1375 Aviators Street. I'm employed with Dixie Brewery and I'm a watch engineer.

THE COURT: I'm sorry, you're what?

MR. DUGAS: Watch engineer.

THE COURT: And you're married?

MR. DDUGAS: Single.

THE COURT: Single.

MR. DUGAS: Yeah.

THE COURT: Okay. Thank you.

Okay. Juror number 8.

MRS. BLANKE: My name is Geraldine Blanke. I live in Metairie at 4729 Southshore Drive and I have raised family. My husband is semiretired and was salesman.

THE COURT: Okay. Thank you.

Okay, Ms. Couvillion: My name is Gail Couvillion. I live in Metairie. I have three children. My husband is an air conditioning, heating electrical contractor and I'm does, and the name and address of your employee. Okay? Let's start with Mr. Sumrall.

MR. SUMRALL: I live in Folsom, Louisiana. I'm married. I have a wife. housewife. I'm retired.

THE COURT: You worked as a construction worker, is that correct?

MR. SUMRALL: I worked as a construction worker, right.

THE COURT: Okay, Thank you, Mr. Sumrall.

MR. SUMRALL: Thank you.

THE COURT: Okay. Mrs. Baldock.

MRS. BALDOCK: Baldock.

THE COURT: Okay.

MRS. BALDOCK: My name is Diane Baldock. I live in Harvey, Louisiana. I'm married. I have two grown sons and my husband is a sales engineer for Control Systems, Incorporated out of Jackson, Mississippi.

THE COURT: Okay. Thank you, ma'am.

Okay, Mrs. Batiste.

MRS. BATISTE: My name is Cindy Batiste. I live in Lacombe, Louisiana, I'm married. I'm employed with Allstate Insurance Company and my husband is a school bus driver.

THE COURT: Thank you.

Okay. Mrs. August.

With respect to Mr. Dugas, the defendants - - Dugas may have been pre-plaintiff's disposition, they should have - - in other words, if he thinks he has that they should have probed into it during voir dire examination. So to now raise that, it's too late in the game to now raise that as a reason for striking a juror. I simply asked counsel if there were any other questions that could be asked a juror at which point in time counsel indicated he had known. The time to raise the objection about bias of a juror is prior to the time the court selects the jurors and not at this stage right here.

And with respect to juror Mrs. Beaulieu, I don't find the issues to be so highly technical that Mrs. Beaulieu cannot been a witness in this case. I still submit that race was the motivating factor.

THE COURT: Anything else that you all want to respond?

MR. SEALE: Nothing.

THE COURT: Okay. I find that plaintiff has not made a prima facie showing that the peremptory challenges were based on race; there are two black jurors on the panel. And also based on the explanations given I don't find the challenges made were pretextual. So your *Batson* challenge, so to speak, is denied. Okay?

MR. WILSON: That's preserved for the record, is

Supreme Court, U.S.
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No. 93-1554

In the Supreme Court of the United States

OCTOBER TERM, 1993

JACQUELINE PADDIO, PETITIONER
V.
BOARD OF TRUSTEES FOR STATE COLLEGES
AND UNIVERSITIES, ET AL

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE FIFTH CIRCUIT

T. JAY SEALE, III
200 North Cate Street
P. O. Drawer 2787
Hammond, LA 70404
PH: (504) 345-8058
COUNSEL FOR DEFENDANTS

PARTIES TO THE PROCEEDING

Respondent agrees with the enumeration of the parties to the proceeding as set forth by petitioner in her petition for a writ of certiorari but would note that the Board of Trustees for State Colleges and Universities was dismissed pursuant to a motion for judgment as a matter of law as is reflected by a Judgment of the district court (Pet. App. 2a) and that petitioner has never appealed that dismissal. The only three defendants who remain in the case, therefore, are Dr. G. Warren Smith, Dr. Robert Butler and Thomas Douple.

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Moore v. Keller Industries, Inc., 948 F.2d 199 (5th Cir. 1991)

U.S. v. Hughes, 970 F.2d 227 (7th Cir. 1992)

U.S. v. Alston, 895 F.2d 1362 (11th Cir. 1990)

STATEMENT

Respondents do not offer a separate statement of the case but would only note, that with regard to the peremptory challenge of Ms. Lorraine Beaulieu as a potential juror, petitioner has slightly mischaracterized the facts. Petitioner argues that "the characteristics deemed by counsel to be objectionable in Ms. Beaulieu were not possessed by her but instead by two (2) Caucasian females, whom he found acceptable. Ms. Beaulieu was not a housewife, and she was employed. (Pet. App. 5a-6a) The two (2) Caucasian females, Mrs. Gail Couvillion (Pet. App. 6a), and Mrs. Diane Baldock (Pet. App. 7a), were unemployed housewives." Petitioner has failed to note that Beaulieu's employment status was only one of several grounds proffered by the respondents for the challenge of Ms. Beaulieu; other factors included her background, her education, her level of sophistication, and her inability to understand the issues in the case. (Resp. Lodging 2-c). Respondents concede that they were in error with regard to Mrs. Beaulieu's employment status, but of greater significance is that petitioner's failure to note the other justifiable grounds for challenge creates the illusion that respondents "manufactured" a singular (and erroneous) justification for a discriminatory challenge.

SUMMARY OF ARGUMENT

(1) The presence of two blacks on the jury, while not dispositive of the question of whether a *Batson* violation occurred, is entitled to substantial consideration as part of the total relevant circumstances upon which such a determination is made. The jury composition was one factor considered by the trial court in its' determination that respondents' challenges were non-discriminatory. The affirmation of that finding by the United States Fifth Circuit Court of Appeal does not conflict with any decision of any other court of appeal. Furthermore, neither the trial nor the appellate court found that jury composition alone precluded the establishment of a prima facie case of discrimination.

(2) The statement of counsel for respondents to the trial judge that he did not "think that it is appropriate for us to disclose to the court why we chose a juror" does not require a finding that the challenges were, in fact, based on race. Under applicable law, proof of a *Batson* claim involves a three step process. First, the defendant must make a prima facie showing that the prosecution exercised peremptory challenges on the basis of a juror's cognizable racial background. As petitioner offered nothing more than the fact that the three challenges were of black venire persons, a prima facie case was not established. [*U.S. v. Branch*, 989 F.2d 752 (5th Cir. 1993)] Respondents therefore were not obligated to provide explanations. However, when requested by the trial judge to provide such reasons, (even though he conceded that petitioner had not necessarily made a prima facie case [Resp. Lodging 2b]), counsel for respondents offered legitimate, nondiscriminatory challenges for each juror. The judge then ruled that petitioner had failed to make a prima facie case; and that as there were two blacks on the jury and as he

found the explanations given were nonpretextual, the *Batson* challenge was denied. Great deference must be accorded to that ruling of the trial court as findings of discriminatory intent "largely turn on evaluation of credibility." As with the state of mind of a juror, evaluation of the prosecutor's (or in this case, the counsel for defendants) state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Hernandez v. New York*, 111 S.Ct. 1859 (1991).

(3) The challenge of a black venire person for several reasons, only one of which reasons was shared by other jurors, does not compel a finding that the challenge was pretextual. In this case, a juror was struck due to her background, education, apparent level of sophistication (which was below what was need to understand the issues in the case) and due to the fact that she had not been involved in the work force and therefore had no reason to understand employment. Respondents have conceded that the venire person was, in fact, employed, but submit that sufficient other nondiscriminatory grounds existed to justify the challenge. Comparison among jurors is inappropriate in cases where the other jurors share only one attribute, as is the case here.

ARGUMENT

Respondents submit that a review on writ of certiorari is not a matter of right, but of judicial discretion which should only be granted when there are special and compelling reasons therefore. Petitioner presents no such reasons and her request should therefore be denied.

Petitioner's First Argument

Petitioner contends that the decision of the Fifth Circuit affirming the district court's conclusion that the presence of two (2) blacks on a jury precluded petitioner from establishing a prima facie case of racially discriminatory exercise of peremptory challenges directly conflicts with the decisions of this court in *Batson v. Kentucky*, 106 S.Ct. 1712 (1986) and *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) as well as the following circuit court opinions: *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993); *U.S. v. Joe*, 928 F.2d 99 (4th Cir. 1991), *cert. denied Baylor v. U.S.*, 112 S. Ct. 71, 116 L.Ed.2d 45, on remand 787 F.Supp. 548, aff'd *U.S. v. Skeeter*, 989 F.2d 496; *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992); *U.S. v. Bishop*, 959 F.2d 820 (9th Cir. 1992); and *U.S. v. Jiminez*, 983 F.2d 1020 (11th Cir. 1993). In her words, "the position taken by the Fifth Circuit to the effect that the presence of blacks on a jury panel precludes the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges conflicts with that of the Third, Fourth, Seventh, Ninth and Eleventh Circuits. (Petition for Writ of Certiorari, p. 9). In fact, the ruling of the Fifth Circuit in no way conflicts with the decision of any other United States court of appeal.

The implication of the manner in which this argument is phrased is that the trial court held that the presence of two blacks on the jury alone precluded the establishment of a prima facie case, and that the Fifth Circuit affirmed such a finding. That is simply not the case. The trial judge, in his reasons for denial of the *Batson* motion, found that the challenges were not based on race and cited the fact that there were two black jurors on the panel as well as the fact that the explanations given were not pretextual. The presence of two blacks on the jury was therefore just one of several factors considered by the judge and by the appellate court. Furthermore, the only argument ever offered by respondents with regard to the ultimate composition of the jury was that two black jurors were seated before respondents exercised their first challenge. Batiste and August, both of whom were black and, who were, respectively, the third and fourth members of the panel, were accepted by respondents before they ever exercised their first challenge. Beaulieu, Dugas and Golden, the three jurors who were challenged, were, respectively, the sixth, seventh and twelfth members of the panel. (Resp. Lodging 1a-g). Respondents would refer the court to the case of *U.S. v. McAnderson*, 914 F.2d 934 (7th Cir. 1990), where black defendants failed to establish a prima facie case of discriminatory intent when the government had accepted two of four black venire persons before exercising a single peremptory challenge and where the government struck other black members only after providing the district court with racially neutral reasons for the use of peremptory challenges.

Petitioner has cited several cases from varying circuits to support her argument. These cases merit a closer review than was afforded by petitioner. (Incidentally, one of those cases, *Splunge v. Clark*, does not stand for the

proposition for which it has been cited.) The first case is *U.S. v. Bishop*, where the court held that representativity and a prosecutor's acceptance of black jurors are factors that a trial judge may take as an indication of non-discriminatory motive. In this case, the prosecutor's explanations for his questioned challenges (that the juror lived in a predominantly low-income, black neighborhood and was likely to believe that police "pick on black people") failed to satisfy *Batson's* mandate and could not be counterbalanced by the racial make-up of the jury. In the instant case, however, the explanations of counsel were a factor which must considered in addition (rather than contrary) to, along with the racial composition of the jury, as evidence that no violation of *Batson* had occurred. In other words, the two factors complimented, rather than contradicted, one another. In the case of *U.S. v. Joe,* defendant-appellants were convicted by a jury of offenses resulting from their participation in a kickback scheme involving United States Navy contracts. The government used six of its' eight peremptory challenges to exclude black jurors, five from the panel and one alternate. The only white juror the government struck from the panel was a prospective juror whom the government had unsuccessfully challenged for cause. Six black jurors initially were seated on the petit jury. Several jurors seated were excused during the course of the trial and replaced by alternates. The jury that ultimately deliberated and returned its verdicts of guilty included five black members. On appeal, the court found that the trial court erred in ruling that a *Batson* violation did not occur since members of the defendants' racial group were seated on the jury. The court wrote, at 928 F.2d 103:

> While the fact that black jurors were seated is entitled to substantial consideration, it is

> not dispositive of this issue and does not preclude a finding that defendants established a prima facie violation of *Batson*... The composition of the jury may be considered as part of the total relevant circumstances upon which a determination of discrimination in jury selection is made, but is not dispositive of that issue.

The singular quotation from *U.S. v. Joe* noted by petitioner, in her petition, was lifted from a larger passage, which when read in its entirety, supports respondents' argument that the presence of two blacks on the jury is one legitimate factor for consideration.

That passage reads as follows:

> Although the presence of members of a defendant's race on a jury may weigh against a finding of discrimination, a defendant is not automatically foreclosed from establishing a prima facie case of discrimination under *Batson* even when members of the defendant's racial group were seated. (That portion of the quotation which has been underlined was omitted from petitioner's petition.)

Similar selective editing occurred in petitioner's treatment of the case of *Jones v. Ryan*. In the *Jones* case, the court considered the exercise by the government of peremptory challenges to exclude three blacks. One black served on the jury. The court, in considering the *Batson* challenge, wrote, at 987 F.2d 971:

> Although one black person was ultimately empaneled, the "mere presence of a single black on the jury would not necessarily prevent a finding of a prima facie case." (Emphasis ours)

The subtle omission of petitioner in her petition: the single word necessarily (Petition, page 7).

Note should also be taken of the petitioner's failure to draw the significant distinctions which exist between *Jones* and the instant case. In *Jones* the appellate court noted that the record before the district court did not show on its face that factual findings were made. Specifically, neither the state trial court nor the state appellate court made a finding whether the defendant established a prima facie case of racially discriminatory exercise of peremptory challenges by the prosecutor. Additionally, the state courts failed to make any finding whether the prosecutor provided race-neutral explanations for eliminating the three black venire persons. Finally, the state trial court failed to make a finding concerning the ultimate question, whether the prosecutor intentionally discriminated against any one of the three black venire persons whom he excluded in exercising peremptory challenges. The significance of these factors was explained by the Court, at page 966, as follows:

> In short, there were no findings of fact made below to which this court must accord a presumption of correctness.

The same is not true in the instant case; it is very significant that the record of the trial contained the entire jury selection process including the respondents explanations for their challenges and the judge's ultimate ruling on the *Batson* challenge. (Resp. Lodging 2a-d). As has been noted hereinabove, deference to the trial court findings on the issue of discriminatory intent makes particular sense in these cases as the finding will "largely turn on evaluation of credibility."

Such a standard of review was, in fact, imposed in the *Jiminez* case cited by petitioner, where the Court, considering a *Batson* challenge, held, at 983 F.2d 1023-24, as follows:

> Seven of the twelve jurors empaneled were African-Americans. While this statistic does not negate the possibility of race discrimination, it is significant to the highly deferential review which we undertake in this case. (Emphasis ours).

Not surprisingly, petitioner only refers to the first half of that quotation in her petition. (Petition, p. 8).

The fact that two blacks sat on this jury is not an absolute factor in the determination of whether or not illegal

reasons existed for the peremptory challenges; however, it is a factor which should be accorded substantial consideration (*U.S. v. Joe*) and petitioner's argument to the contrary should be dismissed without further consideration.

Petitioner's Second Argument

Petitioner contends that the statement of counsel for respondents that he did not "think that it is appropriate for us to disclose to the court why we chose a juror" requires a finding that the reason was, in fact, based on race, under the authority of *Hernandez v. New York*, 111 S.Ct. 1859 (1991).

The standard of review as to the issue of discriminatory exercises of peremptory challenges was set forth succinctly in the *Hernandez* case, where the court wrote, at page 1869:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will "largely turn on evaluation of credibility"...As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

The trial judge observed the demeanor of counsel for respondents, heard the arguments propounded in support of the peremptory challenges, and reached the conclusion that the reasons were legitimate and non-pretextual. Unless clearly erroneous these findings of fact are entitled to great deference and should not be disturbed. Although counsel for respondents did not offer any explanation for his belief that he was not obligated to provide explanations for his challenges, such a statement cannot result in an automatic finding that the challenges were based on race. Several reasons why counsel objected to the court's *Batson* inquiry can be deduced from the context of the colloquy between the court and counsel. First, the trial judge had inadvertently let the burden shift. Without first finding a *prima facia* case of race-related exercise of peremptory challenges, the court required counsel for respondents to disclose the strategy of jury selection to the court and plaintiff's counsel. Second, had the court sustained the *Batson* challenge, respondents would find appeal of that determination more difficult had their counsel not interposed an objection to the court's approach to the problem (an argument which became moot after the court denied plaintiff's *Batson* motion.)

This Court, in the *Hernandez* case, supra, held that proof of a *Batson* claim is a three step process. First the defendant must make a prima facie showing that the prosecution exercised peremptory challenges on the basis of a juror's cognizable racial background. Second the burden shifts to the prosecution to articulate a race neutral explanation for removing the juror in question. Finally, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. In this case the trial court judge had not made a finding that such a case had been proved before requiring explanations of the

challenges; it is just as logical that this (as opposed to illegal intent) was the reason that counsel for respondents did not feel obliged to provide any explanation. Petitioner's attempt to prove up a prima facie case consisted of the following exchange:

> MR. WILSON: Your Honor, for the record, I'd like to challenge the peremptory selections made by the defendants predicated on the fact that it is my belief that they're based solely upon race which is an impermissible basis for making a peremptory exception.
>
> THE COURT: Well, what's your basis for saying that? You have juror number 2 and juror number 3, they're both black and they're both female.
>
> MR. WILSON: Right. They had three peremptory challenges and all three were used to knock off black jurors.
>
> THE COURT; Well, Mr. Golden, is he black or white? I can't remember.
>
> MR. WILSON: Yes, sir.

> THE COURT: Okay. so your basis for saying that is notwithstanding the fact they left two blacks on the jury, is the fact that they cut three blacks during their peremptory --
>
> MR. WILSON: Right. The fact --
>
> THE COURT: -- challenge, is that correct?
>
> MR. WILSON: They only had three peremptories.
>
> (Resp. Lodging 2a-b).

When the only evidence offered by a challenging party is that a black prospective juror was struck, a prima facie *Batson* claim does not arise. *U. S. v. Branch*, 989 F.2d 752 (5th Cir. 1993). The judge, after counsel initially declined to provide his reasons, admitted that the first step in proof of a *Batson* challenge had not necessarily been satisfied:

> Well, I'm not saying at this point that he made a prima facie case but in the alternative under the *Batson* case the burden then shifts to you to articulate a race neutral explanation for striking the juror. So it is appropriate

> when I ask. Do you want to go ahead and let me know what the reason is for the challenges.

Incidentally, in her brief to the Fifth Circuit, petitioner tried to develop an "after the fact" prima facie case on the grounds that: "(1) plaintiff is black, and defendants used all of their peremptory challenges to exclude blacks from the jury: (2) the use of peremptory challenges permits discrimination in the selection of jurors by one with a desire to do so; and (3) plaintiff is black, defendants and all of their witnesses are white, and this is a civil rights case in which plaintiff alleged that she was discriminated against, inter alia, on the basis of race." (Resp. Lodging 3a-b). This explanation must be discounted by counsel's closing argument to the jury, when after he had been unable to establish any evidence whatsoever to support a racial discrimination claim, he stated:

> Well, one thing about it, I will admit now, they don't discriminate on the basis of race when it comes to females, black females and white females, they discriminate against them equally. You know, they don't make the distinction, they don't say we're going to treat white females better than black females or black better than white, their position is that, you know, you're all the same and we are going to

> discriminate against you in the same way in favor of males. That was their message. (Resp. Lodging 4a-b).

It is apparent, that under *Hernandez*, counsel for respondents was under no obligation to provide any explanation for the challenges until a prima facie case had been made. However, despite this fact and in accordance with the judge's instructions, counsel for respondents immediately provided the requested explanations which the trial judge found to be non-pretextual. Under *Hernandez* that factual finding should not be disturbed.

Petitioner's Third Argument

Petitioner contends that the striking of a black venire person for reasons and under conditions where similarly situated white venire persons were not struck violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.

As was pointed out in the Statement above, respondents have conceded that they were in error with regard to the employment status of Ms. Beaulieu when asked to explain their challenge of her. Respondents also admit that two unemployed white women were not challenged. However, as was also pointed out hereinabove, Ms. Beaulieu's employment status was only one of a number of reasons proffered for her exclusion. Respondents also challenged Ms. Beaulieu on the grounds that her background in education and apparent level of sophistication was below what was needed to understand the issues in the case, reasons which were proffered and accepted as non-pretextual in the case of *United States v. Tucker*, 773 F.2d

136 (7th Cir. 1985) cert denied *Bell v. U.S.*, 106 S.Ct. 3337, 478 U.S. 1021, 92 L.Ed. 2d 742 and 106 S.Ct. 3338, 478 U.S. 1022, 92 L.Ed. 2d 742, rehearing denied 107 S.Ct. 23, 478 U.S. 1035, 92 L.Ed. 2d 774.

Petitioner overreaches with her statement that holdings from the Third and Eighth Circuits concerning comparability among potential jurors negatives a neutral explanation in this particular case. In the case of *U.S. v. Wilson*, supra, the Eighth Circuit held that the government's claim that it had struck a black from the jury because it had outside information that the black was a friend of the defendant and had participated in a boycott with which the defendant was sympathetic was an insufficient neutral explanation for striking the black panel members without any showing as to whether white jury panel members were or were not participants in the boycott. Furthermore the government could not justify peremptory challenges of blacks on the theory that they were likely to have known the defendant and would, because of race, sympathize with his position. Among the findings of the Eighth Circuit, however, was that the government's justification for striking the black panel members rested on an "after the fact" excuse. The government, many months after the trial and pending the original appeal to this court, recreated a list of reasons for the strikes for the benefit of the appellate panel even though no record existed to support such an argument. Such is not a problem in the instant litigation. Likewise, in the case of *Jones v. Ryan*, supra, the Third Circuit held that the fact that a black prospective juror had a twenty year old child of the same approximate age as the defendant was pretext for using a peremptory challenge in a racially discriminatory manner where two white jurors had children of the same approximate age and were not challenged. The *Jones* case can be distinguished from the instant litigation

for the very reasons set forth above, that there were other grounds for the challenge.

Furthermore, respondents would cite the Court to several other cases where different circuit courts of appeal have found that the comparability issue does not automatically render a challenge suspect. In *Moore v. Keller Industries, Inc.*, 948 F.2d 199 (5th Cir.1991), the court found that because multiple reasons led to the challenge of two jurors, the existence of other jurors with some of those individual characteristics did not demonstrate that the reasons assigned were pretextual. In *U.S. v. Hughes*, 970 F.2d 227 (7th Cir. 1992), a juror had been excluded for being young, unemployed, and from an unstable or untraditional background because she was never married, yet had three children. The court found the challenge to this juror was non-discriminatory even though some unemployed white venire members were empaneled because none of the white venire members had all of these factors in combination. Incidentally, another black juror had been struck on the grounds that she had a cousin with a drug conviction who was also awaiting trial on another drug arrest. The government also stated that she was challenged because she was unemployed, which was incorrect. The court found that there was no relevance to the error since the primary reason for excluding her was her relationship with her cousin. Finally, in *U.S. v. Alston*, 895 F.2d 1362 (11th Cir. 1990), the court held that attributes among jurors are not always easily compared and often require an evaluation of the degree to which the prospective juror manifests the stated attribute. Respondents concede that the employment status of potential jurors is more easily compared than certain other attributes but again note that the employment status of Ms. Beaulieu was only one factor taken into consideration by the respondents. Given this fact

and for all of the foregoing reasons, the argument of petitioner is without merit.

CONCLUSION

Contrary to the argument of petitioner, the Fifth Circuit has not taken the position that the presence of blacks on the jury panel precludes the establishment of a prima facie case of racially discriminatory jury selection. The composition of the jury was only one consideration in the original ruling of the district court and the subsequent affirmation of that ruling by the Fifth Circuit. Furthermore, the cases cited by petitioner do not stand for such a proposition; those cases provide that racial composition of the jury can be one factor in the determination of a *Batson* challenge but that factor alone is not determinative, which is the very argument propounded by respondents.

The comment by counsel for respondents with regard to his belief that he was not obligated to provide explanations for his challenges was appropriate under applicable law. Until a prima facie case of discrimination is proved, the party who made the challenges is not obligated to provide any explanation. The fact that the challenges were of black jurors does not in and of itself constitute a prima facie case, and the trial judge acknowledged that a prima facie case may not have been proved lends credence to this position. Still, when instructed by the court, counsel for respondents provided the requested reasons. The trial judge was in the best position to gauge the demeanor of counsel as well as the aptness of the jurors who were excused. He found that the reasons given were non-pretextual. Great deference must be accorded that finding of fact.

The fact that an attribute of one of the challenged jurors was shared by two non-challenged jurors is absolutely irrelevant given the fact that the challenged juror possessed

other attributes which contributed to the challenge and those attributes were not shared by the two non-challenged jurors.

A unanimous jury found in favor of respondents. That verdict was upheld by a unanimous ruling of the Fifth Circuit. The issues presented to this Court by petitioner are not only of no national significance, they are meritless as well.

Respectfully submitted.

T. JAY SEALE, III
200 NORTH CATE STREET
P. O. DRAWER 2787
HAMMOND, LA 70404
PH. (504) 345-8058
COUNSEL FOR RESPONDENTS

April 13th, 1994.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on counsel for all parties by depositing same in the U.S. Mail, postage prepaid, this 13th day of April, 1994.

T. JAY SEALE, III